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**ORIGINAL** BEFORE THE ARIZONA CORPORATION COMMISSION

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**COMMISSIONERS**

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AZ CORP COMMISSION  
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IN THE MATTER OF THE APPLICATION OF  
MCIMETRO ACCESS TRANSMISSION  
SERVICES, LLC, FOR APPROVAL OF AN  
AMENDMENT FOR ELIMINATION OF UNE-  
P AND IMPLEMENTATION OF BATCH HOT  
CUT PROCESS AND QPP MASTER SERVICE  
AGREEMENT

DOCKET NO. T-01051B-04-0540  
DOCKET NO. T-03574A-04-0540

**STAFF'S RESPONSE TO QWEST'S EXCEPTIONS TO  
THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED OPINION AND ORDER  
DENYING QWEST'S MOTION TO DISMISS**

**INTRODUCTION**

On July 28, 2004, MCImetro Access Transmission Services, LLC ("MCImetro") filed an application with the Commission seeking approval of an Interconnection Agreement between it and Qwest Corporation ("Qwest") for elimination of UNE-P and implementation of a batch hot cut process. At the same time MCImetro filed for approval of another related agreement with Qwest entitled the QPP Master Service Agreement.

On August 6, 2004, Qwest filed a Motion to Dismiss MCImetro's application. Briefs were filed by the parties, including Commission Staff. An oral argument was held and subsequently at the request of Qwest and Staff, approximately 29 other QPP Master Agreements that Qwest had filed with the Commission for informational purposes were consolidated with this Docket since the same issue regarding Qwest's filing obligation was raised.

1 On June 28, 2005, the Administrative Law Judge ("ALJ") filed a Recommended Order  
2 Denying Qwest's Motion to Dismiss. On July 7, 2005, Qwest filed extensive Exceptions to the  
3 Recommended Order and raised substantive legal arguments regarding recent rulings by the  
4 Minnesota Public Utilities Commission and a federal district court in Montana to which none of  
5 the other parties had an opportunity to respond. By Procedural Order dated July 11, 2005, the  
6 ALJ gave interested parties, including Commission Staff, the opportunity to file a response to  
7 Qwest's exceptions by August 5, 2005.

8 Staff files the following response to Qwest's Exceptions. Staff strongly supports the  
9 ALJ's Recommended Order and urges the Commission to adopt it. It is a very well-reasoned  
10 decision on the issues raised. While the additional authority submitted by Qwest is informative,  
11 it is not binding on the Commission, and the Commission is not required to follow it in reaching  
12 its decision on this matter.

### 13 ARGUMENT

#### 14 I. Commission Staff Supports the ALJ's Finding that the QPP Master Services 15 Agreement is An Interconnection Agreement Which Is Required to be filed with the 16 Commission for Approval

17 The QPP Master Services Agreement is an interconnection agreement which is required  
18 to be filed with the Commission under Section 252(e) of the 1996 Act. The QPP agreement  
19 establishes the terms and conditions for unbundled access to network elements; and as such is an  
20 interconnection agreement. It is required to be filed with the Commission because Section  
21 252(e)(1) of the 1996 Act provides as follows:

22 "Any interconnection agreement adopted by negotiation or arbitration shall be  
23 submitted for approval to the State commission. A State commission to which an  
agreement is submitted shall approve or reject the agreement, with written  
findings as to any deficiencies." (Emphasis added).

24 Further, there is no dispute between the parties that the ICA Amendment for each company is an  
25 interconnection agreement subject to Commission review and approval. This is significant  
26 because the ALJ found that "the QPP Agreement and the proposed ICA Amendment are clearly  
27  
28

1 integrated agreements that are not severable.”<sup>1</sup> The ALJ pointed out at least two provisions within  
2 the QPP Agreement that are expressly interrelated with the ICA Amendment for each Company,  
3 which Qwest concedes is subject to Commission review and approval.<sup>2</sup> Just because Qwest  
4 decided to turn what is clearly one agreement into two, to avoid its filing obligations with respect  
5 to a portion of the agreement, should not be enough to put the second agreement (the QPP Master  
6 Services Agreement) outside of the Commission’s oversight jurisdiction. A similar argument  
7 made by Qwest in the Unfiled Agreements Docket was rejected by the Commission.<sup>3</sup>

8 Moreover, there is little question when one examines the FCC’s *Local Competition First*  
9 *Report and Order*<sup>4</sup> at paras. 165-171 that the FCC interprets the filing requirement very broadly:

11 “We conclude that the 1996 Act requires all interconnection agreements, ‘including  
12 any interconnection agreement negotiated before the date of enactment of the  
13 Telecommunications Act of 1996 to be submitted to the state commission for  
14 approval pursuant to section 252(e). The 1996 Act does not exempt certain  
15 categories of agreements from this requirement. When Congress sought to exclude  
16 preexisting contracts from provisions of the new law, it did so expressly. For  
17 example, section 276(b)(3) provides that ‘nothing in this section shall affect any  
existing contracts between location providers and payphone service providers or  
interLATA or intraLATA carriers that are in force and effect as of the date of  
enactment of the Telecommunications Act of 1996.’ Nothing in the legislative  
history leads us to a contrary conclusion. Congress intended, in enacting sections  
251 and 252, to create opportunities for local telephone competition. We believe  
that this pro-competitive goal is best effected by subjecting all agreements to state  
commission review.”<sup>5</sup>

18 The FCC well understood the consequences of not requiring the filing of all agreements  
19 with the State commissions for approval:  
20

21 <sup>1</sup> See Recommended Order at p. 8.

22 <sup>2</sup> The termination provision in the QPP Agreement gives both parties rights to terminate the related ICA Amendment.  
There is also an integrated pricing structure that is referenced in the QPP Agreement.

23 <sup>3</sup> In the Unfiled Agreements Docket, Qwest went through each unfiled agreement and highlighted provisions which it  
believed the Commission had no authority to review under Section 251 of the Act. The Commission rejected the  
24 Company’s arguments and required the Company to file the complete agreements for Commission review and approval.

25 <sup>4</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98,  
*First Report and Order*, 11 FCC Rcd 15499 (1996) (“*Local Competition First Report and Order*”), *aff’d in part and*  
*vacated in part sub nom., Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997) and *Iowa Utils.*  
*Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *aff’d in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *on*  
*remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8<sup>th</sup> Cir. 2000), *petitions for writ of certiorari granted, Verizon*  
*Communications Inc. v. FCC*, 121 S.Ct. 877, 878 (2001); *Order on Reconsideration*, 11 FCC Rcd 13042 (1996); *Second*  
*Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed*  
*Rulemaking*, 12 FCC Rcd 12460 (1997), further recons. pending.

28 <sup>5</sup> *Id.* at para. 165.

1 "As a matter of policy, moreover, we believe that requiring filing of all  
2 interconnection agreements best promotes Congress's stated goals of opening up  
3 local markets to competition, and permitting interconnection on just, reasonable,  
4 and nondiscriminatory terms. ....Requiring all contracts to be filed also limits an  
5 incumbent LEC's ability to discriminate among carriers, for at least two reasons.  
6 First, requiring public filing of agreements enables carriers to have information  
7 about rates, terms, and conditions that an incumbent LEC makes available to  
8 others. Second, any interconnection, service or network element provided under  
9 an agreement approved by the state commission under 252 must be made  
10 available to other requesting telecommunications carrier upon the same terms and  
11 conditions, in accordance with section 252(i)." <sup>6</sup>

12 Section 252(a)(1), the provision upon which Qwest relies, itself states that "[u]pon  
13 receiving a request for interconnection, services or network elements pursuant to section 251, an  
14 incumbent local exchange carrier may negotiate and enter into a binding agreement with the  
15 requesting telecommunications carrier or carriers without regard to the standards set forth in  
16 subsections (b) and (c) of section 251. Section 251 covers a broad array of wholesale services to  
17 which the Section 252 filing obligation applies. The QPP Master Services Agreement, is a  
18 voluntary agreement for wholesale services, or network elements pursuant to 251, without regard  
19 to the standards set forth in subsections (b) and (c) of that section. As such, Qwest is required to  
20 file it with the state commission for approval.

21 **II. The ALJ Correctly Rejected Qwest's Arguments That the QPP Master Services**  
22 **Agreement is Not An Interconnection Agreement That Does not Have to Be Filed**  
23 **with the Commission for Approval**

24 The ALJ correctly rejected Qwest's strained interpretation of the 1996 Act which would  
25 absolve it from the responsibility to file many agreements with the Commission in the future.  
26 Qwest primarily relies upon a statement made by FCC in a footnote in its *Declaratory Order* in  
27 response to Qwest's request for a declaratory ruling on the scope of the duty to file and obtain  
28 prior approval of state commissions of negotiated contractual arrangements under Section  
252(a)(1) of the 1996 Act.<sup>7</sup> In that footnote, the FCC stated that it disagreed with parties that  
advocate that all agreements had to be filed between an incumbent LEC and a requesting carrier,

<sup>6</sup> *Local Competition First Report and Order* at para. 167.

<sup>7</sup> See *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 902-89, 17 FCC Rcd 19337, Memorandum Opinion and Order (October 4, 2002) ("Declaratory Order").

1 but instead that “only those agreements that contain an ongoing obligation relating to section  
2 251(b) or (c) must be filed under 252(a)(1).”<sup>8</sup> Staff agrees with the ALJ that Qwest’s reliance  
3 upon this footnote is misplaced because the FCC was merely responding to arguments by some  
4 parties that Section 252 required all agreements between the incumbent LEC and another carrier  
5 to be filed. Because Qwest was facing potential fines and penalties for not filing certain  
6 agreements with the State commissions at the time, Staff believes that the FCC was attempting to  
7 construe the statute in a manner that would not impose unlimited liability upon Qwest or other  
8 carriers for failing to file “any” agreement with the State commissions, which potentially could  
9 include some which had no relation to the LEC’s interconnection or wholesale service  
10 obligations.

11 Qwest’s argument that the agreement has to contain ongoing obligations relating to  
12 Section 251(b) and (c) of the 1996 Act is also troubling when read in the context of 252(a) itself.  
13 Section 252(a) allows carriers to enter into voluntarily negotiated agreements *without regard to*  
14 *the standards contained in Sections 251(b) and (c) of the 1996 Act.*

15 Qwest also argues that the Recommended Order improperly expands the scope of the  
16 filing requirement by stating that agreements between an ILEC and a CLEC containing terms  
17 and conditions for non-251 services are subject to the 252 filing obligation. However, this is  
18 solely a problem of Qwest’s own making. Qwest itself has chosen to make two agreements out  
19 of what should be one integrated agreement so that it does not have to file a large portion of the  
20 agreement (the QPP Master Services Agreement) with the Commission for approval.  
21

22 Qwest would also limit the commission’s ability to determine whether a specific  
23 agreement is an interconnection agreement in the first instance. The FCC stated that “the state  
24 commission should be responsible for applying, in the first instance, the statutory interpretation  
25 we set forth today to the terms and conditions of specific agreements.”<sup>9</sup>

26  
27 <sup>8</sup> Qwest points out that the Staff referred to the language in Footnote 26 in the Unfiled Agreements case. Qwest’s  
28 arguments notwithstanding, Staff arguments in this case are not inconsistent with its arguments in the Unfiled  
Agreements case.

<sup>9</sup> *Declaratory Order* at para. 7.

1  
2 **III. The Supplemental Authority Cited By Qwest is Not Binding Upon the Commission**

3 Virtually all of the states in Qwest's in-region service territory have found that the QPP  
4 Master Services Agreement is an Interconnection Agreement which must be filed with the State  
5 Commission for approval under Section 252 of the 1996 Act.

6 Qwest relies upon a recent Minnesota Public Utilities Commission decision and a  
7 decision of the Montana District Court to argue that it should not have to file the Master Services  
8 Agreement with the Commission for approval. While certainly these decisions are informative  
9 and should be considered by the Commission, they are not binding upon the Commission. The  
10 Staff agrees with the ALJ who found that these decisions, which both found that the agreements  
11 at issue did not contain Section 251 obligations that are subject to 252 review, were incorrectly  
12 decided. Section 251(a) itself recognizes that a voluntarily negotiated interconnection agreement  
13 can be entered into without regard to the obligations contained in Sections 251 (b) and (c) of the  
14 1996 Act.

15  
16 **CONCLUSION**

17 The Commission should reject Qwest's arguments that the QPP Master Services  
18 Agreement is not an Interconnection Agreement that is required to be filed with the Commission  
19 for review and approval under Section 252 of the 1996 Act.

20  
21 RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of August, 2005.

22  
23  
24 

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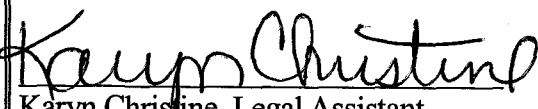
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